be weak or unscrupulous, he will not hesitate to incriminate others to further his own self-interest. Long experience in granting leniency to 'co-operative' accomplices has undoubtedly shown the hazards in the practice to be more than offset by benefits to society in the detection and punishment of crime. It requires no extended discussion, however, to establish that the existence of such a promise might be a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony. The failure to disclose an 'understanding' or a promise cannot but seriously impair the jury's ability to pass upon this vital issue, and that is precisely the infirmity under which the jurors labored in the case before us.

"It is true that in his interrogation the judge elicited some vague answers which might have induced the jury to believe that Mantzinos was 'hoping' for leniency, and in his charge he indicated his own belief that the witness entertained such a hope. *But that is a far cry from positive knowledge that Mantzinos had actually been assured consideration in return for continued cooperation and that he had deliberately lied about the matter on the stand.* Had the jury been apprised of the facts, it would have been in a better position to evaluate his veracity. In the first place, the conditional promise of consideration, the jurors could have concluded, furnished strong motivation for 'co-operation' exceeding the bounds of truth. And, in the second place, even more significant because more revealing of the man, knowledge that Mantzinos had lied under oath might well have lowered the jurors' assessment of his regard for the truth in general and, by that token, affected their appraisal of his other testimony incriminating defendant.

"(4) *Convincing though proof of guilt may be, and there can be no denial of its strength in this case, we could here affirm 'only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt.' People* v. *Mleczko, supra*, 298 N.Y. 153, 163, 81 N.E.2d 65, 69. We were not in Mleczko, and we are not now, prepared to announce such a doctrine" (Italics appellant's).

That to support said statement of fact appellant presents:

(a) In the opinion of which Judge Powell was author as the same appears in appendix to appellant's jurisdictional statement at page xlii, this appears:

"It was agreed between counsel that both York and Burns had testified that they had not been promised anything by the county attorney for his testimony."

(b) Charles E. York, called as witness upon the trial of appellant, testified at transcript, pages 1003-1004, as follows:

Q. "Bob Hurt alleges that you were used as a witness against him; that your testimony was false insofar as his connection with the robbery was concerned; is that true?

A. Yes, sir.

Q. That the County Attorney made many trips, he and his Assistants to McAlester to persuade you to give this testimony?

A. Yes, sir.

Q. And that they promised you that, if you would so testify, in order to get you to testify, they would secure a reduction of your sentence; is that true?

A. Yes, sir.

Q. And that on your testimony as a witness you denied that promise?

A. Yes, sir, I did.

Q. Will you state to the Judges whether or not you were told by the County Attorney's office to deny that promise when you testified?

A. Yes, sir.

Q. And that's the reason you did it?

A. Yes, sir, it was."

(c) Judge Dick Jones, formerly Presiding Judge of the Criminal Court of Appeals, author of the first opinion here, at transcript, pages 958-959-960, testified as follows:

Q. "(By Mr. White) Will you state to the Judges whether or not shortly after that trial you had visitors from the County Attorney's office to discuss a matter pending in your court?

A. Yes, sir.

Q. Tell His Honor who they were.

A. Mr. Martin and Mr. Hassman.

Q. Will you tell His Honor what they wanted or what they said they wanted?

A. The * * * Mr. York's case had been assigned for oral argument. They came to our courtroom that day and Mr. Tant was not present and the case was submitted without argument. After the argu-

ments had concluded they came into my office and discussed the case with me.

Q. Did they make any suggestion about how the case should be ruled on and why?

A. They told me that they felt obligated to assist York on his appeal and that's why they had come to the Court on that occasion.

Q. Did they make any statement to you with reference to Mr. Scanland's condition?

A. Yes, sir.

Q. In that connection, did they state to you that—

Mr. Berry: (Interrupting) I'm going to object to him leading his witness.

Judge Fogg: Don't lead him. Just let him testify as to what was said.

Q. (By Mr. White) What did they say was Mr. Scanland's condition?

A. I'll give you my best recollection of what occurred.

Q. That's what I want.

A. Mr. Martin came in my office first and we started to speaking and then Mr. Hassman came in after he had been there two or three minutes. And they said that Mr. Scanland was in the hospital and that they * * * that they had had a conversation with Mr. York. They had told Mr. York that if he would come clean and testify in the Hurt case and tell the truth about the whole transaction, they would do what they could to assist him on his appeal; get his sentence reduced.

They asked me to reduce the sentence, and I told them that I wouldn't consider it at all be-

cause the crime was too inhuman and barbaric; that a man had already put the County to expense of being tried, and I would not concur in any recommendation that sentence be reduced at all.'

Q. Now state, Judge Jones, whether or not any statement was made by these gentlemen, or either of them, about what would happen to Scanland if their promise was not kept.

A. They expressed a fear that Mr. York would escape the penitentiary, or one of his friends might even go to the hospital where Mr. Scanland was seriously ill and cause him harm if they were not successful in giving York assistance on the appeal.

Q. As they had promised him?

A. Yes, sir."

(d) That notwithstanding the fact that both Mr. Martin and Mr. Hassman were in the courthouse or in the immediate vicinity thereof when Judge Jones testified, neither took the stand to contradict his statements.

(e) That the same Mr. Joe Martin, identified by Judge Dick Jones, in arguing to the jury and to persuade conviction of appellant, instead of exposing York's falsehood, corroborated the same as follows (Tr. 976-977):

"Now York came here and testified, and I'll tell you why. He's not the nicest guy in the world, and far from it, and you've never heard me say that he was, or you've never heard anybody say, who was associated with the prosecution of the case, that he is anything but what he is, a despicable thug. But he did that, and he came up here, in my judgment, solely for vengeance, solely to get even because he had been promised—and the evidence is in there—that he had been promised by

this defendant and his associates and others that they would provide an alibi for him. And when the thunder finally hit him, when he realized that the prosecution was so thorough, and that police work by the Federal Bureau of Investigation and State Crime Bureau and the Sheriff's office and the Police Department of your City had him backed right to the wall, they couldn't get witnesses, and the net result was he was thrown to the wolves in an effort to protect the third man, and he got forty-five years for his trouble.

"And when he sat in the penitentiary for a certain length of time it finally got through his thick, stupid skull that he had been had, and he was mad, and he was ready to 'blow the whistle.' But not until he found out about Burns."

(f) That Mr. Granville Scanland, County Attorney of Oklahoma County, Oklahoma, during the prosecution of appellant, testified at transcript, pages 1038 to 1042, inclusive:

Q. "You took a written statement from Burns too, didn't you?

A. Yes, sir.

Q. You wrote it yourself, didn't you?

A. No, sir.

Q. Did you dictate it?

A. I did.

Q. You dictated it, didn't you?

A. I asked the questions and Mr. Burns dictated his own answers.

Q. When was that taken with reference to the time when Burns' trial was stricken?

A. A very short time before, a day or two, or three.

Q. It was at night before you struck it at 9:00 o'clock the next morning, wasn't it?

A. It could have been, if that's what the record shows.

Q. Isn't that true?

A. Mr. White, I don't recall exactly.

Q. That's what Burns testified. Now I didn't know anything about it or my client didn't know you were taking these statements, but it was taken on the night before Burns was due to go on trial at 9:00 o'clock the next morning, wasn't it?

A. If that's what the record reflects, that's correct. They are both a matter of record.

Q. And that's the reason the case was stricken, wasn't it?

A. No. No, it isn't. In a way it was. It was stricken because at that time it was not necessary to go to trial the next day.

Q. It was stricken because he made that statement.

Mr. Berry: I'm going to object to the form of the question.

Judge Fogg: Don't argue with the witness.

Q. (By Mr. White) *I'm asking you, isn't that true?*

A. *That's partially true, yes.*

Q. *What's the other part; what other thing motivated it?*

A. *The fact that his attorney was going to plead him guilty later on.*

Q. *Oh, yeah, and you and his attorney agreed that when he did plead him guilty you'd make some sort of recommendation?*

A. *That's right.*

Q. *That's right?*

A. *Of a sort.*

Q. *Now you did do that?*

A. *How's that?*

Q. *You did do that?*

A. *Yes.*

Mr. White: And Burns knew that. That's all, gentlemen.

The Witness: I don't know what Burns knew.

Mr. White: I hope you gentlemen got the significance of that.

Q. (By Mr. White) Mr. Scanland, you charged, or a member of your office, charged Frank Massad with perjury, didn't you?

A. Yes.

Mr. Berry: I renew my objection now, Your Honor, to all of this Frank Massad testimony.

Judge Fogg: Overruled.

Q. (By Mr. White) And that charge was held over Massad until he appeared and testified against Hurt, wasn't it?

A. Sid, I don't know what you mean by 'held over.' If you mean as a club, no.

Q. Well, it pended on the docket?

A. That's right.

Q. And in December of last year you dismissed it, didn't you?

A. That's correct.

Q. Now did you charge Frank Massad with improper conduct before the State Bar?

A. No, sir.

Q. Did you sign a complaint charging him?

A. No, sir.

Q. Did you join Judge Traub in charging him?

A. No, sir.

Q. You did appear and testify for Frank Massad, didn't you?

Mr. Berry: If the Court please, I want to object to all of this testimony about the Bar Association proceedings. Mr. White is a very able and astute lawyer, and he knows full well that all of those proceedings are secret and privileged, and that there is no way to get at the testimony of a complaint.

Mr. White: They are not privileged in this type of case.

Judge Fogg: Now wait a minute. The question can be asked as to whether he was there, but I am not going to allow him to go into the detail of what occurred.

Mr. Berry: That's why I wanted to get him to stop now before he started to testify.

Mr. White: I want to make my record. Has the Bar Association got any rule that suppresses this sort of evidence? If they have, the Legislature ought to know about it.

Judge Fogg: Go ahead and ask him the question.

Q. (By Mr. White) Did you appear before the State Bar Association as a witness for Frank Massad? I'm asking first did he appear?

A. I appeared before a committee of the State Bar as a witness.

Q. For Frank Massad at his request?

A. Yes, that's right.

Q. And you testified in his behalf, didn't you?

A. Put it this way, Sid: I testified."

(g) That Mr. Joe Martin, already identified herein and in charge of the prosecution of the appellant, in arguing to the jury the question of appellant's guilt at transcript, page 976, instead of exposing the falsity of Burns, himself imposed upon the jury as follows:

"Now, I have said before publicly, and I repeat, that if Adrian Wayne Burns does not go to the penitentiary, I will resign from the County Attorney's staff and I will never again practice law in this State.

"Now then, in answer to your question, Mr. Mounger, I will say this: That if Adrian Wayne Burns elects to come before a tribunal in this county and enter a plea of guilty, that I will not make one single recommendation in his behalf. Now does everybody understand that once and for all?"

(h) That, even 'tho there was no denial of Scanland's promise to Burns, as though to corroborate him, that gentleman together with his assistant, Mr. Martin, made good the promise and in recognition thereof, in his opinion at page xlv of the appendix to appellant's jurisdictional statement, Judge Powell had this to say:

"County Attorney Scanland and Mr. Martin appeared before Judge Mills and recommended the amazingly low sentence of seven years for Burns, who admitted to torturing the robbery victim with the red hot curling iron, though he swore that Hurt suggested the method of torture. This in the face of the fact that York, the flunky in the case, had received 45 years, as did Hurt. One of the reasons given for the low recommendation was that Burns had already spent over a year and a half in jail. It now develops from the record that the Pardon and Parole Board has now given Burns credit for the jail time, and he is already out of the penitentiary. The Pardon and Parole Board may be expected to give consideration to credit for jail time, and the trial court, in view of the policy of the Board, should not give consideration to time spent in jail awaiting trial, in fixing sentence. If there are inequities in the matter of assessment of penalties among the co-defendants that is now a matter that may receive the attention of the Pardon and Parole Board, giving attention to the nature of the crime for which conviction had."

III.

That appellant contends that he was deprived of a trial before a fair and impartial jury, that this is a violation of the Fourteenth Amendment to the Constitution of the United States, and that said deprivation is cognizable and curable by this Honorable Court.

That to so convince the Court, appellant calls attention to the language of Judge Murrah, delivering the opinion of the United States Circuit Court of Appeals for the Tenth Circuit in *Baker* v. *Hudspeth*, 129 F.2d 781:

"(1, 2) There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and *14th Amendments*, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus" (Italics appellant's).

That in an effort to establish a factual basis for this allegation, appellant filed in the Criminal Court of Appeals:

(a) His "Application for Leave to Further Diminute the Record by Developing Facts of Importance to a Decision Here But Not Included in the Case-made" (Tr. 1142), wherein appellant charged that large deputy sheriffs, armed with pistols, were stationed in the courtroom during and throughout his trial, escorted the judge to and from different places, and created the impression that appellant was an abandoned and vicious character, dangerous to the safety of said judge, which said matter was given wide publicity by the press.

(b) His "Ancillary Application in the Nature of *Coram Vobis* to Diminute the Record" (Tr. 1162) wherein appellant charged that the Sheriff of Oklahoma County had been ordered and required to refute the allegations of his said pleading.

(c) His "Additional Application in *Form Coram Vobis* to Supplement the Record" (Tr. 1168) wherein he charged that on his former trial, which resulted in a mistrial, the press invaded the jury room, identified Paul C. Jones as the juror refusing to vote for a verdict of guilty, and publicized the vote of the jury under a large, front-page headline entitled, "Hurt Juror's Old Arrest Disclosed as Deadlock Moves Into Fourth Day"; that on the 24th of November, 1954, another article was published in the *Daily Oklahoman* under headline, "Judge Dismisses Hurt Jury, Declares Mistrial as Jury Stands 11 to 1 for Conviction"; and that on November 20, 1954, the *Daily Oklahoman* published a vicious article, destructive of the standing and reputation of this appellant under front-page headline, "Reporter Tells Story Behind Secret Record" wherein the interest of the press in procuring Massad to entrap appellant was revealed; that during the deliberation of said jury said juror's wife was threatened anonymously unless her husband yielded his conscientious opinion and voted for a verdict of guilty which said threat was communicated to the trial judge and by him ignored; that all said matters were given the widest publicity and circulation in Oklahoma County, Oklahoma, both by press and by television; that the same were read, seen and believed by the entire body of society, rendering it utterly impossible for appellant to secure a fair and impartial jury; that copies of said publication were attached to said pleading; and that, under such circumstances, his motion for change of venue was

denied and he placed on trial in said atmosphere so deliberately created.

That appellant offered to prove the allegations of each of said pleadings (which were verified) and his offer was, by the Criminal Court of Appeals, denied, which said denial of an opportunity to complete the record contributed to depriving him of his liberty without due process of law and is cognizable and curable by this Honorable Court: *Chessman* v. *Teets, Warden*, 77 Sup. Ct. 1127.

That this Honorable Court is charged with the duty of enforcing the Constitution of the United States, together with the Fourteenth Amendment thereto, and that the command of said amendment to "deprive no person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws" runs against the various states of the Union only, Oklahoma included.

That so, appellant charges that the State of Oklahoma and the public press have rendered him an outcast, his defense impolitic, unpopular and unprofitable, all of which accounts for his faulty and frail representation here.

That in said second opinion of the Criminal Court of Appeals by Judge Powell many other grievances and complaints of appellant were noticed and passed lightly by as a matter of form without regard to their substance, and he invites the attention of the Court thereto.

That appellant, impelled by necessity so to do, here presents in greater detail the substance of his complaints

to cure the frailty of his jurisdictional statement rendered too brief, in the interest of economy.

That appellant believes this to be a matter of great public importance, one to which each member of the Court should give attention to the end that further deprivation of constitutional right be avoided in the future.

That because of improper and insufficent presentation, this Honorable Court, as appellant believes, by error, oversight and inadvertence, overlooked and failed to consider the settled, controlling principles of law hereinbefore cited and the uncontradicted facts hereinbefore recited when it dismissed his appeal and denied him certiorari.

WHEREFORE, appellant prays that he be granted a rehearing herein, that upon said rehearing this Honorable Court assume jurisdiction of the subject matter hereof; and that upon final consideration said cause be reversed and appellant be granted a new trial to the end that he may have the benefit of a fair and impartial trial as guaranteed by the Constitution of the United States.

Respectfully submitted,

SID WHITE,
445 Commerce Exchange Building,
Oklahoma City 2, Oklahoma,
Attorney for Appellant.

November, 1957.

CERTIFICATE

I, Sid White, attorney of record for appellant, do hereby certify:

That the foregoing Petition for Rehearing is filed and presented in good faith and not for delay. That said petition is restricted to substantial grounds available to petitioner and not previously presented.

Dated at Oklahoma City, Oklahoma, this ..... day of November, 1957.

SID WHITE,
445 Commerce Exchange Building,
Oklahoma City 2, Oklahoma,
Attorney for Appellant.